SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-394

MICHAEL PATERNO and PATERNO & SONS, INC.,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

ARTHUR KARGER
Counsel for Petitioners
600 Madison Avenue,
New York, N. Y. 10022

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I.

As to the discriminatory application of the Federal immunity statutes.

Contrary to the Government's contention (br., p. 7), the record in this case does squarely present the issue raised in the petition herein (pp. 9-13) as to the propriety of differentiating between the Government and the defense with respect to the availability of the Federal immunity statutes.

The witness James O'Reilly had previously testified for the Government under a grant of immunity. He was thereafter called as a witness by the defense for the purpose of

testifying with respect to certain "technical matters" relating to "the plans, the photographs and the specifications" on the various jobs (1460a).[1] O'Reilly had not been served with any subpoena by the defense, and the limited nature of his anticipated testimony for the defense could not possibly have exposed him to any risk of self-incrimination. O'Reilly's possible need of immunity was suggested only by the prosecutor and the trial court and only in connection with the prosecutor's anticipated cross-examination of O'Reilly (Pet., pp. 10-11).

The trial court first unequivocally announced that the immunity which O'Reilly had received as a Government witness would not extend to any of his testimony as a defense witness (1458a). The court thereafter ruled that it would not grant immunity to O'Reilly as a defense witness because he was appearing voluntarily without having been served with a subpoena by the defense (1467a-1468a). Defense counsel thereupon asked the trial court to allow him to take the time to go to the Clerk's office to obtain a subpoena, but the court refused to do so (1467a-1468a).

The trial court then asked O'Reilly what his position was in view of his possible exposure to the risk of self-incrimination on cross-examination by the prosecutor, and O'Reilly stated, "Maybe I should have immunity again" (1470a). The court also asked O'Reilly whether he would be willing to testify if he did not receive immunity, and O'Reilly stated, "I don't know" (1470a). Defense counsel then acceded to the court's suggestion that the witness be excused until defense counsel could "get a subpoena . . . and consider what . . . [defense counsel] want[ed] to do with him" (1470a).

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[1] Unless otherwise specified, figures in parentheses followed by the letter "a" refer to the pages of defendants' joint Appendix in the Court of Appeals, and "Pet." refers to the petition for certorari herein.

The trial court concluded the matter by stating (1472a):

> "So I will, at Mr. Brill's [defense counsel's] request, excuse Mr. O'Reilly. I do not know how I will proceed if he is subpoenaed and any kind of application is made to me—I simply don't know. * * *
>
> "I must say that if the purposes of calling him are as sharply limited as those described by Mr. Brill I do not see the necessity for going into all this, but if that is the only way it can be done then we will have to face each question as we come to it."

There can be no question that the trial court here flatly ruled that it would not grant O'Reilly immunity with respect to his testimony as a defense witness. The trial court referred to the fact that O'Reilly had not been served with any subpoena by the defense. However, that circumstance was no justification for the court's ruling, since it was only the prosecutor's anticipated cross-examination that occasioned O'Reilly's possible need for immunity, and it was therefore immaterial whether O'Reilly initially took the stand for direct examination pursuant to subpoena or voluntarily.

The rulings made by the trial court, coupled with the intimidating remarks addressed to O'Reilly by the prosecutor and the trial court (see Pet., p. 13), effectually deprived the defense of O'Reilly's testimony as a defense witness. Even though the trial judge's concluding remarks were that he did not know how he would "proceed" if O'Reilly were thereafter subpoenaed and "any kind of application" were made to him, there was no assurance that the trial judge would in any way modify his rulings.

II.

As to the Government's disregard of its published regulations designed for the protection of taxpayers charged with violations of the tax laws.

Contrary to the Government's claim (br., pp. 7-8), the revised regulation here involved, as published in the Federal Register, itself recited that it was first to become effective on April 12, 1973. See Internal Revenue Practice General Procedure Rules, § 601.107(b)(2), amended April 12, 1973, 38 F.R. 9227. The purported change in regulation which, the Government claims, occurred on December 14, 1972, consisted of nothing more than an internal and unpublished memorandum circulated within the Internal Revenue Service ("IRS") on that date. As shown in the petition herein (pp. 15-16), the Government itself admitted in the court below that "the publicly available version" of the above IRS regulation was not "amended to reflect the change" until April 12, 1973.

The Government cites *Sullivan* v. *United States*, 348 U.S. 170, 173, as authority for its position that the Grand Jury had plenary power to indict notwithstanding the Government's violation of its own regulations. The *Sullivan* case, however, is clearly distinguishable. All it involved was an internal letter circulated by the Department of Justice among the various United States Attorneys, and this Court emphasized that that letter "was simply a housekeeping provision of the Department", and that "it was never promulgated as a regulation of the Department and published in the Federal Register" (348 U.S. at 173). In contrast, the present case involves a duly promulgated regulation of the IRS which was published in the Federal Register. The other cases cited by the Government (br., p. 8) are not in point.

III.

As to the false exculpatory statements offered as proof of the essential elements of wilfulness and guilty knowledge.

In an effort to avoid the question raised in the petition herein (pp. 17-21) concerning the effect of the false exculpatory statements made by petitioner Paterno, the Government (br., pp. 3-4, 5-6) has presented an erroneous and misleading version of the evidence. It thus seeks to convey the impression that by virtue of Paterno's being the president and sole stockholder of the corporate petitioner, he must have known that the checks in question were payable to the order of fictitious payees (Govt.'s br., p. 5). It is clear, however, that Paterno's position as president and sole stockholder would not necessarily make him privy to all the details of the manifold operations of the corporate petitioner, particularly the details relating to the arrangements handled by various subordinates for the hiring of trucks on the different construction jobs (see Pet., pp. 5-6), and there was no evidence to show that Paterno in any way participated in, or had any personal knowledge of, such arrangements for the hiring of trucks.

Furthermore, the Government completely ignores the evidence showing that the invoices from the five payees in question were among "hundreds of bills" which would be presented for payment to Paterno at the end of each month; that the company's expenses were very large, amounting to over 11 million dollars during the five-year period here involved; and that the equipment rental expenses alone during that period amounted to $882,808 (see Pet., p. 8).

The Government (br., p. 6, fn. 3) also presents a distorted version of the testimony given by the company's two former bookkeepers. It thus makes no mention at all of the testimony of Mrs. Louise Ferraro, who was the book-

keeper between 1964 and the spring of 1968. Mrs. Ferraro testified that whenever she presented a check to Paterno for signature, she also presented back-up or substantiation material with it, and there was nothing to show that there was any departure from that practice in the case of the checks signed by Paterno to the order of the payees in question during the period of Mrs. Ferraro's tenure (see Pet., p. 7).

As regards the testimony of Mrs. Anne Altro, who was the bookkeeper from May 1968 through 1970, the Government fails to note that her testimony was that whenever she presented a check to Paterno for signature, there were always substantiating delivery tickets attached to the invoices, except on some occasions when co-defendant Denti would instruct her to prepare checks without delivery receipts and would tell her that he would explain the lack of substantiation to Paterno (Pet., pp. 7-8). There was no evidence to show what explanation Denti gave to Paterno on such occasions for the absence of delivery tickets, or to show that Paterno ever signed a check on any such occasion without there being some substantiation therefor, such as entries in the cost sheets (Pet., pp. 20-21).[2]

There are a number of other misstatements in the Government's brief. It thus states (br., p. 6) that after insist-

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[2] There is no support in the record—and none is cited by the Government—for the Government's innuendo (br., p. 6, fn. 3) that petitioners wilfully violated a "subpoena and court order" calling for the production of "delivery receipts from the five payees." There is indeed nothing in the record to show that the prosecutor ever complained about petitioners' failure to produce any delivery receipts pursuant to any subpoena or court order. In fact, the unavailability of delivery receipts was accounted for by the testimony of the bookkeeper Mrs. Ferraro. She thus testified that in the interests of conserving space, her practice was to remove the back-up receipts from the files and dispose of them after some time had elapsed subsequent to the payment of the particular invoices, leaving only the invoices and the cancelled checks in the files (1105a, 1106a, 1120a).

ing that "the five payees were legitimate truckers", both Paterno and Denti "later denied that they had ever heard of the payees." There is however, no support to be found for the latter statement, either in the record references cited by the Government (544a-546a, 628a-630a, 1269a) or elsewhere in the record.

The Government further asserts (br., p. 4) that the witness O'Reilly testified "that he had never heard of the five alleged truckers * * *." However, all that O'Reilly testified to was that *he had no recollection* as to whether any of the five truckers in question had ever worked on one of the Paterno company jobs, and, as a matter of fact, when he was specifically asked with respect to one of the five, Michael Catenzaro, whether he had ever called "a Michael Catenzaro to rent trucks", O'Reilly's answer was: "I might have, I don't know" (1226a).[3]

IV.

As to the action of the trial court in demeaning petitioners' defense and hampering its presentation.

Contrary to the impression sought to be created by the Government (br., p. 8), the trial court's prejudicial statements—to the effect that the basic issue in the case was whether the five payees in question were existent or nonexistent (Pet., p. 22)—were made after defense counsel

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[3] The Government (br., p. 6, fn. 3) also asserts that "there was a staple mark in every one of the invoices from legitimate truckers *in evidence at the trial*" (emphasis supplied). The Government, however, omits to point out that the total number of such invoices introduced in evidence at the trial constituted but a minor fraction of the total Paterno company invoices from "legitimate" truckers. There was clearly not a sufficiently large or representative sampling of such invoices to serve as the basis for the over-all inference sought to be drawn by the Government with respect to all of the Paterno company's invoices from "legitimate" truckers.

had articulated petitioners' defense, that the monies represented by the checks payable to such five payees had actually been expended by the corporate petitioner for the necessary work of hauling away excavated earth from the job sites involved.

As a matter of fact, at the same time that the trial court expressed its views as aforesaid, it also stated in the presence of the jury that any evidence along the lines of petitioners' announced defense, which did not meet the issue as to the existence of the five payees in question, would be excluded as irrelevant (1315a-1317a).

CONCLUSION

For the reasons set forth in the petition herein and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR KARGER
Counsel for Petitioners
600 Madison Avenue
New York, New York 10022